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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether information contained in investigatory records compiled for law enforcement purposes and privileged from disclosure under Exemption 7(C) of the Freedom of Information Act loses its exempt status when it is incorporated into records compiled for purposes other than law enforcement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not yet reported. The orders of the district court (Pet. App. 26a-35a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1980, and a petition for rehearing was denied on December 19, 1980 (Pet. App. 23a). On March 13, 1981, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 17, 1981. The petition was filed on April 16, 1981, and was granted

on June 15, 1981 (J.A. 42). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. Subsection (a)(4)(B) of the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. Subsection (b)(7) of the Freedom of Information Act, 5 U.S.C. 552(b)(7), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforce-

ment authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

3. The unnumbered provision following Subsection (b)(9) of the Freedom of Information Act, 5 U.S.C. 552(b)(9), provides:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

STATEMENT

1. On June 23, 1976, respondent Howard S. Abramson filed a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking the following documents from the Federal Bureau of Investigation (J.A. 7-8):

> —Copies of any and all information contained in your agency's files showing or indicating the transmittal of any documents or information from the FBI to the White House, or any White House aides, for the years 1969 and 1970, concerning the following individuals: Lowell P. Weicker, Jr.; Thomas J. Meskill; Joseph Duffey; Thomas J. Dodd; Alphonsus J. Donohue; John Lupton; Wallace C. Barnes; and Emilio Q. Daddario;
>
> —Copies of any and all information so transmitted.

—An uncensored copy of the Oct. 6, 1969, letter from J. Edgar Hoover to John D. Ehrlichman by which Mr. Hoover transmits "memoranda" on several individuals to Mr. Ehrlichman.

—A copy of the original request letter from Mr. Ehrlichman to Mr. Hoover for that data.

—Copies of all data so transmitted by the Oct. 6, 1969, letter from Mr. Hoover to Mr. Ehrlichman.

—A copy of the receipt signed by the recipient at the White House of the Oct. 6, 1969, letter.

This request was denied on the grounds that, absent disclosure authorization from the individuals named in the request, the information came within Exemptions 6 and 7(C) of the FOIA, 5 U.S.C. 552(b)(6) and (b)(7)(C), protecting, respectively, "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would * * * constitute an unwarranted invasion of personal privacy" (Pet. App. 5a). On August 3, 1976, Abramson filed a new and broader request that was couched in more general terms and did not include the names of specific individuals. This request was denied on the grounds that it did not reasonably describe the records sought (*id.* at 5a-6a).

On December 20, 1977, after exhausting his administrative appeals, Abramson brought this action in the United States District Court for the District of Columbia to enjoin the FBI from withholding the requested records (Pet. App. 7a). The government's answer denied that Abramson was entitled to any

relief, but, while the suit was pending, the FBI reprocessed Abramson's request and provided more than 80 pages of material, with deletions of information that the government asserted came within Exemptions 1, 7(C), and 7(D) of the Act, 5 U.S.C. 552 (b)(1), (b)(7)(C), and (b)(7)(D) (*ibid.*).[1] Those pages comprised four groups of records consisting of four separate cover letters with attached materials pertaining to individuals named in the cover letters. Each letter was from FBI Director J. Edgar Hoover to John D. Ehrlichman, an aide to President Richard M. Nixon, and each was dated October 6, 1969 (Pet. App. 9a n.12).

The four groups of records were designated "Documents 1, 2, 3, and 4" (Pet. App. 9a-10a n.12). The information at issue here constitutes portions of pages within Document 3, which consists of (i) a cover letter from Hoover to Ehrlichman listing the names of 11 individuals about whom "name check" requests had been made, (ii) summaries of FBI file information on 10 of the 11 individuals (and, in some cases, attached documents, primarily copies of summaries that had been provided in response to requests from earlier administrations), (iii) a copy of an article written by one of the individuals, (iv) an

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[1] Exemption 1 covers properly classified national defense or foreign policy information. Exemption 7(D) covers "investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source * * *." These exemption claims are no longer at issue in this case (Pet. App. 3a n.5).

advertisement in the *New York Times* prepared by the Vietnam Moratorium Committee, and (v) a typed list of the individuals whose names appear in the advertisement (*id.* at 9a n.12).

In an affidavit dated May 2, 1978, FBI Agent Jerry R. Donahoe explained (J.A. 11-12) that the FBI periodically received name check requests from the White House regarding persons being considered for federal appointment or persons who would be attending White House functions and for whom a security check was thus necessary. (As Agent Donahoe noted in a later affidavit (J.A. 18), similar requests were also received from other federal agencies.) When receiving a name check request from the White House, the FBI would search its files and assemble the records it possessed on the individual and would then extract pertinent information from those records and submit a memorandum to the White House (J.A. 11-12). As the released portions of Document 3 indicate (see, *e.g.*, J.A. 31), the FBI would in some instances simply summarize its information in a single name check summary. If it possessed a summary prepared in response to a previous White House request concerning the individual, however, it would attach that summary to the new summary (see, *e.g.*, J.A. 32).[2]

The government filed a motion to dismiss or in the alternative for summary judgment on the basis of its exemption claims and supporting affidavits. The dis-

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[2] Even when the FBI had undertaken no previous investigation of the subject of the name check request, its records of investigations of other persons sometimes contained information about that individual. The FBI was able to locate such information in its Central Records System through a cross-reference index (known as "see references") (J.A. 10).

trict court denied the motion, holding (Pet. App. 32a-34a), *inter alia*, that the Exemption 7 claims had not been substantiated because the government had not shown that the documents at issue were investigatory records "compiled for law enforcement purposes." The government thereafter submitted a renewed motion for summary judgment supported by a second affidavit by Agent Donahoe, in which he traced the deleted segments of information to their origins in FBI investigatory files. In this affidavit Agent Donahoe stated (J.A. 18-19) that virtually all the deleted segments were taken from records compiled either as part of a criminal investigation or in response to an inquiry for information concerning an individual under consideration for a government appointment. The affidavit did not give the reasons the White House had requested information on the 11 individuals described in the Document 3 summaries, but it again explained generally the FBI's statutory responsibility for providing name check information to aid in the determination of the suitability of candidates for federal office and in assuring the security of the President and of foreign visitors to the White House (J.A. 18; C.A. App. 27-29).[3]

Based on the Donahoe affidavits, the government contended that the deletions from Document 3 were exempt from disclosure under Exemption 7(C) of the FOIA. In arguing that the threshold showing of "law enforcement purposes" had been established, the government contended that the FBI was fulfilling a law enforcement function in responding to White House name check requests. The government also argued that, in any event, this requirement was met by the

[3] "C.A. App." refers to the joint appendix filed in the court of appeals.

affidavit tracing the deleted segments to their origin in records unquestionably compiled for law enforcement purposes.

The district court rejected the government's argument that, in responding to the 1969 White House request, the FBI was generating investigatory records compiled for "law enforcement purposes" rather than records compiled for possible "political purposes" (Pet. App. 26a-27a). It noted in this connection that each of the 11 individuals about whom the White House had sought information had been "prominently associated with liberal causes and/or [had] been outspoken in their opposition to the war in Indochina that was being waged by this nation at that time" (*id.* at 27a). The court observed, however, that the government had contended "that certain materials compiled for enforcement purposes are exempt from disclosure pursuant to exemption (7)(C) because disclosure would constitute an unwarranted invasion of personal privacy," and it held that the government had "validly invoked this exemption" (*ibid.*).

2. Respondent Abramson appealed the district court's ruling on the Exemption 7(C) claims (Pet. App. 11a & n.14), and the court of appeals reversed (*id.* at 1a-22a).

In the court of appeals, the government defended the district court's order on the ground that it correctly distinguished between the compilation of summaries in response to the 1969 White House request, a request as to which the district court found no evidence of law enforcement purposes, and the original compilations of the segments of deleted privacy information, which were identified in Agent Donahoe's second affidavit as having been undertaken for specific law enforcement purposes. The court of ap-

peals concluded, however (Pet. App. 13a-14a), that the district court had made two inconsistent rulings: (i) that the Document 3 records were not compiled for law enforcement purposes and (ii) that, nevertheless, information in those records was protected from disclosure by Exemption 7(C).

The court of appeals was willing to accept, for the purposes of its decision, that the government had established that the deleted information in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes' " (Pet. App. 14a). Furthermore, the court of appeals did not suggest any disagreement with the district court's finding that disclosure of this information would constitute an unwarranted invasion of personal privacy. Nonetheless, the court below held (*id.* at 14a-15a) that the deleted segments were outside the protection of Exemption 7(C) because the government had failed to show that the name check summaries themselves were compiled for law enforcement purposes or that the summary pages were "duplicates of any FBI investigatory documents * * * compiled for legitimate law enforcement purposes." The court construed "the statutory scheme of the FOIA" as indicating that "exemptions from disclosure apply only to *documents*, and not to the use of the information contained in such documents" (*id.* at 15a; emphasis in original; footnote omitted). It added (*ibid.*): "Thus, when information has been recompiled in a new document for a new purpose, the new document must qualify independently for any exemptions from disclosure under the FOIA." The court accordingly rejected what it characterized as the government's " 'pass through' theory" and held that "the recompiled summary documents have been improperly withheld" (*id.* at 18a).

The court of appeals noted, however, that records comprising Document 3 consisted of both name check summaries and "attachments" and that the district court had not, in making its threshold Exemption 7 determination respecting the purposes of the record compilations, made a separate inquiry as to the attachments (Pet. App. 18a-19a). Because the court of appeals found itself "unable to determine from the evidence in this case the precise nature of the 'attachments' or the purposes for which they were originally created," it remanded the case to the district court "for a finding on the issue of whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original; footnote omitted). Only if the "original documents were sent to the White House as initially compiled and without *any* modification" would the information contained in those documents be entitled to the protection of Exemption 7 (*id.* at 21a; emphasis added).

The government's petition for rehearing, with suggestion for rehearing en banc, was denied, two judges dissenting (Pet. App. 24a-25a).

SUMMARY OF ARGUMENT

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), protects from mandatory disclosure "matters that are * * * investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * constitute an unwarranted invasion of

personal privacy." The court of appeals has held that information that is collected by an agency for law enforcement purposes and that meets the criteria of Exemption 7(C) loses its exempt status if it is later incorporated into a document compiled for purposes other than law enforcement. This holding rests on a simplistic distinction between "documents" and "information" that is inconsistent with the legislative history of Exemption 7 and that subverts the purposes of the exemption without serving the larger disclosure goal of the Act.

1. Congress amended Exemption 7 in 1974 because courts had inflexibly construed the exemption in its original form so as to permit the government to withhold any material compiled for law enforcement purposes so long as it was located in an agency's "investigatory files." The amendment changed the reference from "investigatory files" to "investigatory records" and described six specific harms to law enforcement or private party interests, in order to make disclosure turn on the *reasons* for withholding information rather than the *location* of that information. In the debates on the amendment to Exemption 7, members of Congress used interchangeably such terms as "documents," "records," "matters" and "information." The term "records," therefore, can hardly have the talismanic significance accorded it by the court of appeals. Congress also added a new provision requiring the government to disclose any "reasonably segregable portion" of a record, thereby again indicating that documents were not to be treated as indivisible units for exemption purposes but that distinctions were to be made among their parts.

Although the court of appeals implicitly acknowledged that the making of an exact duplicate of a *document* compiled for law enforcement purposes does not constitute a recompilation of the document that would require a determination concerning the purposes of the duplication, it effectively held that duplication of the *information* in a record compiled for law enforcement purposes does constitute such a recompilation. By thus resurrecting this document/information distinction, the decision below effectively disregards Congress' intent in amending Exemption 7 and adding the segregability provision, both of which require a focus on the *content* of a document rather than the details of its physical creation or location.

2. The central purpose of the FOIA is "to ensure an informed citizenry" in matters important to the functioning of the democratic process. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Congress recognized, however, that the disclosure requirements of the Act had to be subject to particular exemptions in order to protect legitimate governmental and private interests that could be harmed by release to the public of certain types of information. In applying the provisions of the FOIA in a particular case, a court should seek to accommodate both the general disclosure purposes of the statute and the purposes served by the specific exemptions. The court of appeals' decision in this case frustrates the congressional intent reflected in Exemption 7(C) to protect personal information concerning individuals collected in law enforcement records, without noticeably advancing the philosophy of open government embodied in the statute.

Respondent assertedly made his FOIA request in order to determine if the White House had attempted

to make improper political use of FBI files. The documents released by the FBI as a result reveal the fact of the White House request for FBI files on named individuals and the positive FBI response to that request. Disclosure of details concerning the personal lives of those on whom the White House sought information would in no way advance any public interest objective, but it would invade the personal privacy of those individuals. Indeed, the lack of any rational relationship between the court of appeals' theory and the disclosure purposes of the Act is indicated by the court's decision to remand the case as to certain "attachments" to "name check" summaries provided by the FBI for a determination whether they were mere copies of FBI investigatory records compiled for law enforcement purposes. The court would not require disclosure of exempt material contained in any such copies of raw files transmitted to the White House, but it would require disclosure *of the identical information contained in those files* if it had been incorporated into a separate memorandum written in response to the White House request. This unreasonable distinction is compelled by neither the language nor the history of Exemption 7.

Under the court of appeals' reading of Exemption 7, the FBI and other law enforcement agencies may avoid disclosure of sensitive information simply by transmitting a copy of its *original* investigatory record rather than incorporating portions of the record into a new document. But this "remedy"—attaching complete, raw investigative files rather than merely summarizing portions of the file in another document—demonstrates the court's excessively literal interpretation of the exemption, an interpretation that is responsive to none of the concerns underlying the

FOIA. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

ARGUMENT

INFORMATION CONTAINED IN INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES AND PRIVILEGED FROM DISCLOSURE UNDER EXEMPTION 7(C) OF THE FOIA RETAINS ITS EXEMPT STATUS WHEN IT IS INCORPORATED INTO RECORDS COMPILED FOR PURPOSES OTHER THAN LAW ENFORCEMENT

Exemption 7(C) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(C), protects from disclosure "matters that are * * * investigatory records compiled for law enforcement purposes * * * to the extent that the production of such records would * * * constitute an unwarranted invasion of personal privacy." In this case, the court of appeals has held that information collected by the FBI in the course of legitimate law enforcement investigations and falling within the category of personal data that Congress recognized as deserving protection from mandatory disclosure loses that exempt status when it is incorporated in a document created for some purpose other than law enforcement.[4] This holding, as we

[4] The court of appeals accepted, arguendo, the government's assertion that the information at issue in the name check summaries "came from FBI documents that were compiled for legitimate 'law enforcement purposes'" (Pet. App. 14a). Indeed, respondent has acknowledged that, as the case comes to this Court, it must be assumed that the information was "originally acquired for law enforcement purposes" (Resp. Br. in Opp. i, 6). Moreover, the court of appeals did not disturb the district court's finding that release of the information would constitute an unwarranted invasion of personal

show below, rests on an erroneous distinction between "documents" and "information" (Pet. App. 14a-16a) and undermines the purposes of Exemption 7 of the FOIA.

A. The Court of Appeals' Document/Information Distinction Is Erroneous In Light of the Genesis of the 1974 FOIA Amendments

The fundamental basis for the court of appeals' decision is its conclusion that FOIA exemptions "apply only to *documents*," as distinguished from the information contained in documents (Pet. App. 15a; emphasis in original). Thus, in the court's view, information in a document requested under the FOIA is to be evaluated for exemption purposes without reference to the circumstances under which the agency originally collected or memorialized it. And the court of appeals would apply this rule even when the information for which an exemption is claimed appears in the requested document in a form essentially identical to its form in the original memorialization. Whatever the application of this principle to other FOIA exemptions,[5] its application to information—

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privacy. Accordingly, it is undisputed for present purposes that the information, prior to its incorporation into the name check summaries, was exempt from disclosure under Exemption 7(C).

[5] This view is reasonable, for example, as applied to Exemption 5 of the FOIA, 5 U.S.C. 552(b)(5), an exemption that protects from mandatory disclosure pre-decisional communications within an agency and other "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." If a document is determined to be a final agency opinion—and is therefore *not* a pre-decisional communication protected under Exemption 5 (see *NLRB* v. *Sears, Roebuck*

or portions of records—for which an Exemption 7 (C) claim is asserted makes little sense, given the purpose and legislative history of Exemption 7.

Exemption 7, as originally enacted, permitted the government to withhold "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 5 U.S.C. (1970 ed.) 552(b)(7). In 1974, Congress amended Exemption 7 by substituting the term "records" for "files" and by limiting the bases for withholding "investigatory records" to six specific instances of harm to governmental or individual interests.

As this Court noted in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978), after thoroughly canvassing the legislative history of the 1974 amendments, Congress amended Exemption 7 because it disapproved of the " 'woode[n] and mechanica[l]' approach taken by the D.C. Circuit" in a series of cases commencing with *Weisberg* v. *United States Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974). In

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& Co., 421 U.S. 132, 148-154 (1975))—it is obviously not open to the agency to argue, as to material incorporated in the opinion, that the material is exempt because it was originally composed as an internal advisory communication to the decisionmaker. Once the agency chooses expressly to adopt a particular text as its official view, disclosure of the text to the public may be compelled without violating the congressional purpose of protecting the give-and-take of the decisional process. *Id.* at 161.

The court of appeals was mistaken, however, in relying on *Sears* (Pet. App. 19a-20a) for the proposition that the original source of information is always irrelevant to consideration of its exempt status. The purposes of Exemption 7 are different from those served by Exemption 5, and, as we show below, application of the document/information distinction in this case totally undermines certain of those purposes.

those cases, the D.C. Circuit had concluded that any material that could be considered part of an investigatory file was exempt from disclosure, without regard to any legitimate reason for withholding it. Accordingly, "the thrust of congressional concern in its amendment of Exemption 7 was to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file." 437 U.S. at 230. In that connection, Senator Hart, the sponsor of the amendment to Exemption 7, pointed out (120 Cong. Rec. 17033 (1974), *reprinted in* House Comm. on Government Operations & Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502); Source Book: Legislative History, Texts, and Other Documents* 333 (Jt. Comm. Print 1975) (hereinafter "*1975 Source Book*"):

> Our amendment is broadly written, and when any one of the reasons for nondisclosure is met, the material will be unavailable. But the material cannot be and ought not be exempt merely because it can be categorized as an investigatory file compiled for law enforcement purposes.

Thus, reviewing courts would be required to " 'loo[k] to the reasons' for allowing withholding of investigatory files before making their decisions" to uphold or to overrule agency determinations not to disclose. 437 U.S. at 230, quoting *1975 Source Book* 334 (remarks of Sen. Hart).

Nothing in the legislative history of Exemption 7 suggests that Congress believed that personal information satisfying the criteria of Clause (C) should lose the protection it enjoyed when situated in a record created in the course of a law enforcement investigation simply because it has been copied into another record to be used for some other purpose.

Indeed, as noted above, the change from "investigatory files" to "investigatory records" in Exemption 7 was made precisely to prevent courts from mindlessly applying the exemption on the basis of the *location* of an item, as opposed to its nature and the purposes for withholding it. Contrary to the court of appeals' assumption, the word "record" was not added to distinguish documents from the information they contain.

That the term "record" does not have the talismanic character attributed to it by the court of appeals is also indicated by the language employed by the members of Congress who participated in the debates on Senator Hart's amendment to Exemption 7 and the debates preceding the vote to override President Ford's veto of the 1974 FOIA amendments.[6] Members of Congress used terms such as "matters" and "information" virtually interchangeably with references to "records" or "documents." Thus, for example, Senator Hart, in opposing the judicial constructions of Exemption 7 in *Weisberg* and its progeny, expressed his concern that the exemption as it was then construed would be used to "deny public access to *information* * * * previously available." 120 Cong. Rec. 17033 (1974), *1975 Source Book* 333 (emphasis added). Senator Kennedy explained that when he first introduced his FOIA amendment bill (before the *Weisberg* principle had been firmly established), he had "believe[d] that the public was secure in its right to obtain *informa-*

[6] Because the amendment of Exemption 7 was introduced on the floor and was not included in the original House or Senate bills amending the FOIA, the legislative history is found primarily in the debates on the amendment and the later debates concerning the decision to override President Ford's veto.

tion falling within the 'investigatory file' exception to disclosure mandated by the act." 120 Cong. Rec. 17034 (1974), *1975 Source Book* 335 (emphasis added). Representative Reid stated that the amendment to Exemption 7 as enacted by Congress required that the government "specify some harm in order to claim the exemption" rather than "affording all law enforcement matters a blanket exemption." 120 Cong. Rec. 36626 (1974), *1975 Source Book* 413. Senator Robert Byrd noted that he had originally voted against the bill because he had been concerned that it "would severely hamper law enforcement agencies in the gathering of information from confidential sources in the course of a criminal investigation" but that his fears had been allayed by the change in Clause D of Exemption 7, extending it to "all the information furnished by * * * [a confidential] source * * * in the course of a criminal investigation." 120 Cong. Rec. 36877-36878 (1974), *1975 Source Book* 468. And the Conference Committee report on the amended Exemption 7 remarked that the "disclosure of *information* about a person to that person does not constitute an invasion of his privacy." H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974), *1975 Source Book* 230 (emphasis added).[7]

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[7] The FOIA nowhere defines the term "record." See *Forsham* v. *Harris*, 445 U.S. 169, 178 (1980). In Subsection (a)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(a)(4), however, "record" is defined as "any item, collection, or grouping of information about an individual that is maintained by an agency * * *." The Privacy Act was passed on November 21, 1974, the day on which the Senate overrode a presidential veto of the 1974 amendments to the FOIA, following an extended debate on, among other things, the adequacy of the protections in Exemption 7 as amended. 120 Cong. Rec. 36882, 36917, 36976 (1974). The House had overridden the presidential veto the day before. *Id.* at 36633.

Another indication in the 1974 FOIA amendments that a rigid document/information distinction does not reflect the intent of Congress is the addition of the requirement in 5 U.S.C. 552(b) that "[a]ny reasonably segregable portion of a record" be "provided to any person requesting such record after deletion of the portions which are exempt * * *." This provision requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible unit for FOIA purposes. The district court in this case properly distinguished severable portions of the requested records (*i.e.*, information that had been compiled in legitimate law enforcement investigations and that met the requirements of Clause (C) of Exemption 7), from other portions that did not meet exemption requirements. It then permitted the FBI to delete the exempt portions before disclosing the nonexempt portions.

The court of appeals' theory of the document/information distinction could, of course, be said to rest on the use of the term "compiled" in Exemption 7, as well as on the use of the term "records." The phrase "investigatory records compiled for law enforcement purposes" may be construed as focusing on the time of the physical creation of a record as the relevant point for determining the exempt status of its contents. Thus, in the court's view, the information contained in the summaries was all *compiled* or, in the words of the court, "recompiled" (see Pet. App. 15a), at the time the information was copied into the summaries, and that compilation was not "for law enforcement purposes."

This construction of the statute, however, cannot withstand analysis. Even the court of appeals implicitly acknowledged (Pet. App. 14a-15a) that the

mere "duplication"—by photocopying or any other method—of a record compiled for law enforcement purposes would not amount to a new compilation, requiring a determination of the "law enforcement purposes" for copying the record. Yet the court would apparently require such a determination when information is copied from one record into another with the addition of, for example, a new sentence or two: the new record—not an exact duplicate of the one from which the bulk of its contents were copied—would be viewed as having been "compiled" in its entirety on the date of its physical creation. This distinction between duplicate records and records with substantial portions that are duplicates of other records reflects a simplistic understanding of the information-compilation process. Moreover, as we show below (see pages 23-31, *infra*), the distinction makes no sense in light of either the disclosure purposes of the FOIA or the purposes of the exemption at issue here.

In short, although Subsection (a)(3) of the FOIA, 5 U.S.C. 552(a)(3), obligates agencies to make available upon request reasonably described, nonexempt *records*, the critical factor in determining whether portions of those records are exempt under Exemption 7 is their content—the character of the information they contain. And in determining whether the personal information about individuals contained in requested records has been compiled for law enforcement purposes and meets the other requirements of Exemption 7(C), the circumstances of the original collection—or compilation—of the information by the agency is surely of greater significance than the circumstances of its transfer into another piece of paper

to be used within the government for some non-law-enforcement purpose.[8]

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[8] As the court of appeals noted (Pet. App. 16a-18a), this view is inconsistent with the D.C. Circuit's Exemption 7(C) holding in *Lesar* v. *United States Department of Justice*, 636 F.2d 472, 486-487 (1980), a case in which the court found that *summaries* of FBI surveillance records met the threshold "law enforcement purposes" requirement of Exemption 7 because the summaries, although *not* the underlying surveillance records, were compiled for law enforcement purposes. The summaries had been prepared by a task force in the Justice Department's Office of Professional Responsibility in the course of an entirely lawful inquiry concerning, *inter alia*, the propriety and legality of the FBI's activities with respect to Dr. Martin Luther King, Jr. The court of appeals concluded from the available evidence (*id.* at 487) that the FBI's activities regarding Dr. King amounted to a legitimate investigation, "undertaken in good faith," that had "strayed beyond its initial lawful scope."

The court's conclusion that only the "law enforcement" purposes of the requested records—and not the purpose of the FBI's original compilation of the information they contain—could be considered, led Judge Bazelon to observe, in a concurring opinion (636 F.2d at 492), that there existed a "risk" that "private parties [could] successfully obtain access to protected materials simply because they have been incorporated into a subsequent, unprotected agency document." That "risk," of course, materialized in the decision in the present case.

In our view, it was unnecessary for the court in *Lesar* to look to the purpose of the task force summaries in order to justify protecting from disclosure the personal information collected by the FBI and reported in the summaries. The result was sustainable on the ground that, even assuming that the King investigation had exceeded its "lawful scope," the records generated by that investigation were investigatory records of a criminal law enforcement agency and, as such, were protectable under Exemption 7, at least to the extent that adequate showings were made under Exemption 7(C) or 7(D). *Irons* v. *Bell*, 596 F.2d 468, 471-476 (1st Cir. 1979);

B. The Court of Appeals' Focus on the Purpose of the Document Containing the Sensitive Information Rather Than the Source of the Information Itself Furthers None of the Purposes Underlying the FOIA

The central purpose of the FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co., supra,* 437 U.S. at 242 (citations omitted). See also *NLRB* v. *Sears, Roebuck & Co., supra,* 421 U.S. at 152-153; *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 17 (1974). Congress also recognized, however, that there were legitimate reasons for allowing the government to maintain the confidentiality of certain kinds of material. See, *e.g., NLRB V. Robbins Tire & Rubber Co., supra,* 437 U.S. at 224; *Department of the Air Force* v. *Rose,* 425 U.S. 352, 361-362 (1976), quoting *EPA* v. *Mink,* 410 U.S. 73, 80 (1973); *Coastal States Gas Corp.* v. *Department of Energy,* 644 F.2d 969, 984 (3d Cir. 1981) ("goal of citizen access to government information was not intended to overwhelm legitimate privacy interests"). One of the reasons Congress recognized as a legitimate basis for withholding law enforcement investigatory information—the reason embodied in Exemption 7(C)—is the need to protect individuals from "unwarranted invasion[s]" of privacy through embarrassing or otherwise damaging government disclosures of personal information to any member of

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Kuehnert v. *FBI,* 620 F.2d 662, 665-666 (8th Cir. 1980); *Church of Scientology* v. *United States Department of the Army,* 611 F.2d 738, 748 (9th Cir. 1979) (dictum). See pages 26-28, *infra.* The *Lesar* court, however, declined to pass on the validity of this theory (636 F.2d at 486-487 n.83).

the general public who happens to request records containing that information. As Senator Hart explained, this protection extends not only to the subject of an investigation but to "any person mentioned in the requested files." 120 Cong. Rec. 17033-17034 (1974), *1975 Source Book* 333.[9]

In construing the FOIA and applying its exemption provisions in a particular case, a court obviously should seek to read the statute in a manner that accommodates both its general disclosure purpose and its specific confidentiality concerns. *EPA* v. *Mink*, *supra*, 410 U.S. at 80; *Providence Journal Co.* v. *FBI*, 602 F.2d 1010, 1014 (1st Cir. 1979), cert. denied, 444 U.S. 1071 (1980). The decision of the court of appeals frustrates the congressional intent of protecting information in law enforcement files concerning an individual if that person could "reasonably assert an option to withhold [it] from the public at large because of its intimacy or its possible adverse effects upon himself or his family." *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 9-10

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[9] As this Court has recognized (*Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 379 n.16), the protection for personal privacy in Exemption 7(C) is in some measure stronger than that provided in Exemption 6, which excepts from mandatory disclosure "personnel and medical files and similar files the disclosure of which would constitute a *clearly* unwarranted invasion of personal privacy" (emphasis added). The Conference Committee responsible for the 1974 FOIA amendments deliberately deleted the term "clearly" from the initial version of Exemption 7(C) in response to a request from President Ford that the phrase "clearly unwarranted" be removed. 120 Cong. Rec. 33158-33159 (1974) (letters between President Ford and Sen. Kennedy); *id.* at 34162 (letters between President Ford and Rep. Moorhead).

(1975). Moreover, by holding that information of a personal nature given to law enforcement officers loses its exempt status if the information is later incorporated into another document not intended for purposes of law enforcement, the ruling of the court below could result in restricting the flow of essential information from private citizens to the government.

At the same time, the denial of the Exemption 7 (C) claims in this case hardly serves to achieve the goal of open government. Respondent filed his FOIA request in order to explore "the extent to which the White House may have used the F.B.I. and its files to obtain derogatory information about political opponents and those that it perceived as enemies" (Pet. App. 4a) and to disseminate information concerning "any illegal and or unethical activities on the part of the government" (J.A. 41). As a result of respondent's request, the FBI has disclosed documents revealing the identity of the presidential aide who requested the material at issue, the general terms of his request (FBI files on 11 named individuals), and the fact that the FBI honored the request as it had honored thousands of prior name check requests from the White House. Disclosure of the withheld segments of information, which concern the private lives of persons mentioned in the FBI files, would not notably aid respondent's asserted purpose, nor would it serve any other purpose "vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co., supra*, 437 U.S. at 242.

That disclosure would, however, vitiate the purposes for including Exemption 7(C) in the statute. Indeed, by making the availability of the protection Congress has extended to personal information con-

tained in "investigatory records compiled for law enforcement purposes" depend on whether a government official's decision to include the information in another document was made for a "law enforcement purpose," the court of appeals has turned the exemption on its head. The court has essentially held that if the White House staff member who requested this information *did not* have a proper law enforcement purpose for invading the privacy of the persons concerned, then those persons' privacy must be invaded even further by the release of the information he obtained to any member of the public upon request.[10]

Such a reading of the statute is wrong for a reason similar to that invoked by the First Circuit in *Irons* v. *Bell*, 596 F.2d 468 (1979). In that case the court gave a broad reading to the phrase "law enforcement purposes" in Exemption 7 so as to protect personal privacy even in cases in which the personal information at issue was collected by criminal law enforcement agencies in investigations undertaken for possibly questionable purposes. As the court explained (*id.* at 474):

> The character of the materials excluded under Exemption 7 at least suggests that "law enforcement purpose" is as much a description of the type of agency the exemption is aimed at as it

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[10] Abramson's assertion (J.A. 40) that it is not his intent "to publish embarrassing personal details about the lives of certain individuals" is irrelevant. The FOIA provides for disclosure to "any person," without regard to his need for it or any promises he might make to keep it confidential. See *NLRB* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149. If the general public interest in disclosure of the information outweighs the individual's privacy interests, then the information must be disclosed to any member of the public. See *Department of the Air Force* v. *Rose*, *supra*, 425 U.S. at 372-373.

is a condition on the use of the exemption by agencies having administrative as well as civil enforcement duties. We see strong policy reasons supporting this reading of "law enforcement purpose" which would, assuming other conditions are met, extend the exemption to all investigative files of a criminal law enforcement agency. First, if the unjustified nature of an FBI investigation makes Exemption 7 inapplicable, material may be released even though it "constitute[s] an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). Such a result would harm innocent individuals who had no way to test the legality of an FBI investigation.[11]

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[11] The court also pointed out the damage to the interests protected by Exemption 7(D) (relating to confidential sources) by making the applicability of Exemption 7 turn on a judgment concerning the propriety of the investigation in question, and it referred to the "unmanageable burden" that would be placed upon district courts trying, "on a record grown cold after years or decades," to "second or third guess the judgment of a Special Agent in Charge that an investigation was warranted." *Ibid.*

It should also be noted that, although Abramson disclaimed any interest in obtaining confidential source material for which the FBI raised an Exemption 7(D) claim (J.A. 37-38), the rationale of the court of appeals' opinion would also appear to preclude the agency from protecting that information as well if, as here, it has been copied into documents not found to have been compiled for law enforcement purposes. The lower courts have recognized that allowing the protection for confidential sources to be destroyed by such subsequent events as the transmittal of the confidential information from one law enforcement agency to another or the termination of the investigation for which the information was furnished would defeat the purposes for which this exemption was created. See *Sands* v. *Murphy*, 633 F.2d 968, 970 (1st Cir. 1980) (confidential source protected even though promise of confidentiality was made to the source by an agency different from the one holding the requested records); *Pope* v. *United States*, 599 F.2d

Accord, *Kuehnert* v. *FBI*, 620 F.2d 662, 666-667 (8th Cir. 1980). See also *Providence Journal Co.* v. *FBI*, *supra* (sustaining Exemption 7(C) claim for contents of records of illegal FBI telephone surveillance of an individual). In the present case, the persons about whom information appears in legitimate investigatory records of the FBI are hardly responsible for the copying of that information into other records, and no statutory purpose is served by making the availability of that information to the general public turn on the circumstances of the copying, *e.g.*, whether the copying is done for law enforcement purposes, other proper governmental purposes, or improper purposes.[12]

Indeed, the failure of the court of appeals' analysis to serve any discernible purpose of the FOIA is

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1383, 1387 (5th Cir. 1979) (Exemption 7(D) protection remains after investigation or enforcement proceeding is concluded); *Lame* v. *United States Department of Justice*, No. 80-2458 (3d Cir. July 16, 1981), slip op. 11 n.6 (same as to Exemption 7(C)). The subsequent recopying of confidential source material into another document similarly should not defeat an exemption claim asserted to protect the information in the second document.

[12] We are advised that under current FBI practice, a name check request submitted from the White House is made on a standard form with spaces in which the submitting office (the White House Security Office, the Executive Office of the President, or the Technical Services Division of the United States Secret Service) must indicate whether the request is made for the purpose of checking the background of a prospective presidential or White House staff appointee or for the purpose of assuring the safety of the President in the presence of those who will have access to White House events.

In addition, certain safeguards respecting the transmittal of records within the government are now established in Subsection (b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), which took effect in 1975.

apparent in its treatment of what the court referred to (Pet. App. 18a) as the "attachments" to the documents. The court of appeals did not conduct an in camera inspection of the documents at issue, and it is not entirely clear to what "attachments" it was referring. But some of the documents disclosed in whole or in part in this case are, on their face, clearly summary memoranda prepared on earlier occasions pursuant to White House name check requests. For example, the October 6, 1969, summary prepared on John Kenneth Galbraith notes that memoranda of investigation results concerning him, dated March 6, 1961, January 19, 1965, and February 4, 1965, were attached. If, in fact, those earlier memoranda were compiled for law enforcement purposes (*e.g.*, to assist the White House in a security investigation of Mr. Galbraith's fitness for presidential appointment), then, under the court's analysis, the FBI may refuse to disclose any information in the memoranda if the disclosure would constitute an unwarranted invasion of personal privacy. However, if the FBI had simply lifted paragraphs out of those memoranda and retyped them into the 1969 summary, instead of attaching the memoranda themselves, that information would *not* be protected from disclosure under the court's rationale. The court of appeals therefore remanded for a determination "whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests" (*id.* at 21a-22a; emphasis in original) and whether "these original documents were sent to the White House as initially compiled and without *any* modification" (*id.* at 21a; emphasis added).

Under the court of appeals' reading of Exemption 7, then, the FBI and other law enforcement agencies

may avoid disclosure of sensitive information simply by transmitting a copy of their *original* investigative records rather than by incorporating portions of the record into new documents.[13] But this "remedy"—attaching complete, raw investigative files rather than merely quoting or summarizing portions of the file in another document—plainly emphasizes the court's excessively literal interpretation of this exemption. Congress cannot have intended agencies to engage in such burdensome and meaningless devices in order to retain the exempt status of sensitive materials.

In sum, the court of appeals' distinction between information in original law enforcement records and information transcribed from those records into other documents makes no sense either as a means of ensuring that the public is informed about the use made of law enforcement files or as a means of distinguishing between circumstances in which personal privacy claims should be honored and circumstances in which they should not. Where the deleted information is shown to have been taken from investigatory records compiled for law enforcement purposes, and where the agency establishes that disclosure would cause

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[13] It would hardly enhance the protection of personal privacy—or any other purpose of the FOIA—for the FBI, for example, to be required to transmit entire original file documents (rather than pertinent portions) to the State Department for use by the Visa Office in making decisions on visa applications. It would similarly be pointless to require the State Department, as a condition of retaining the exemption, to duplicate such documents, rather than to excerpt pertinent portions, when it sends memoranda to United States embassies abroad for use in responding to foreign governments who seek assurances that they are dealing with reputable persons in business negotiations. See Pet. 16-17.

one of the six harms specified in Exemption 7, the exemption claims for those deletions should be sustained. Such a ruling achieves "a workable compromise between individual rights 'and the preservation of public rights to Government information.'" *Department of the Air Force* v. *Rose, supra,* 425 U.S. at 381 (citation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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